Fusing Construction Sdn Bhd v Sia Kie Sung & Ors

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO S–02–227–1995
MAHADEV SHANKAR, ABU MANSOR AND ABDUL MALEK AHMAD JJCA
19 AUGUST 1996

Limitation *— Trusts — Resulting trust — Suit against a person in whom property had become vested in trust — Application to intervene in action as beneficial owner of property — Allegation that property was bought by money provided by beneficial owner — Whether suit saved from the bar of limitation — Limitation Ordinance (Sabah Cap 72) s 9*

The appellant ('Fusing') was registered as the transferee and legal owner of a shophouse ('the shophouse'). Fusing then leased the shophouse to EON Finance Bhd ('EON Finance'). Differences arose between them and EON Finance discontinued paying rent and refused to vacate. Therefore, Fusing filed the action to have themselves declared owner and for other consequential reliefs. EON Finance asserted that EON Bank Bhd ('EON Bank') was the beneficial owner. Subsequently, Sia Kie Sung ('Sia') and EON Bank applied to intervene. Each of them claimed ownership of the shophouse. Each of them claimed to have provided the entire purchase moneys for the shophouse to Fusing so that Fusing would hold the shophouse in trust for Sia and/or for EON Bank, as the case may be. Fusing submitted that Sia and EON Bank should not have been allowed to intervene because their claim was barred by s 9 of the Sabah Limitation Ordinance (Cap 72) ('the Ordinance'). In the affidavit filed for Sia and EON Bank, it was claimed that because Sia and EON Bank provided the moneys, there was a resulting trust in their favour and their claim could not be barred by the lapse of any length of time. Counsel for Fusing referred to the marginal note of s 9 of the Ordinance and contended that an express trust could not exist in the absence of a declaration of trust manifested and proved by some writing signed by Fusing as title-holder or by Sia or EON Bank as donors. He further submitted that 'resulting trusts' were out of the purview of s 9 of the Ordinance, and was therefore caught by the residual period of six years provided by art 97 of the schedule thereto.

Held, dismissing the appeal:

(1) A claim to intervene should be struck out *in limine* on the ground of limitation only in those cases where it was manifestly plain that the cause of action upon which the claim was based was barred by limitation. If, on the assumption that all the facts pleaded were true, it was manifestly obvious that the claim was barred *and* limitation was pleaded by way of defence, the matter

should not be allowed to go further. On the other hand, if there was material which if established would take the claim out of bounds of the Ordinance, the matter should go to trial (see pp 555I and 556A–B); *Permalu a/l Vyrapan v G Papathi d/o Govindasamy* [1992] 4 CLJ 2024 followed.

(2) It was trite law that the specific purpose for which a trust was created was a matter for inference. Thus, in this case, there was a question of mixed law and fact which merit full hearing (see p 556F–G).

(3) To apply s 9 of the Ordinance, the suit must be by or on behalf of the cestui que trust to recover for his benefit the trust property. If the suit was in substance for this purpose, it would be saved from the bar of limitation by s 9. Thus, on the facts of this case, Sia and EON Bank should be allowed to intervene (see p 556G).

[Bahasa Malaysia summary

Perayu ('Fusing') didaftarkan sebagai penerima pindahan dan pemunya sah sebuah rumah kedai ('rumah kedai tersebut'). Fusing kemudian memajak rumah kedai tersebut kepada EON Finance Bhd ('EON Finance'). Perselisihan telah timbul antara mereka dan EON Finance memberhentikan bayaran sewa dan enggan mengosongkan rumah kedai tersebut. Oleh itu, Fusing memfailkan tindakan supaya mereka diisytiharkan sebagai pemunya dan untuk relief berbangkit lain. EON Finance menyatakan bahawa EON Bank Bhd ('EON Bank') merupakan pemunya benefisial. Ekoran itu, Sia Kie Sung ('Sia') dan EON Bank membuat permohonan untuk mencelah. Masing-masing menuntut pemunyaan rumah kedai tersebut. Masing-masing mendakwa telah menyediakan keseluruhan wang belian untuk rumah kedai tersebut kepada Fusing supaya Fusing memegang rumah kedai tersebut dalam amanah untuk Sia dan/atau untuk EON Bank mengikut keadaan. Fusing berhujah bahawa Sia dan EON Bank tidak sepatutnya dibenarkan mencelah sebab tuntutan mereka dihalang oleh s 9 Ordinan Had Masa Sabah (Bab 72) ('Ordinan tersebut'). Dalam afidavit yang difailkan untuk Sia dan EON Bank, ia didakwa bahawa oleh kerana Sia dan EON Bank telah menyediakan wang, terdapat suatu amanah berbangkit yang memihak kepada mereka dan tuntutan mereka tidak boleh dihalang melalui peluputan sebarang jangkamasa. Peguam untuk Fusing merujuk kepada nota birai s 9 Ordinan tersebut dan berhujah bahawa suatu amanah nyata tidak boleh wujud dalam ketiadaan deklarasi amanah yang ditunjukkan dengan jelas dan dibuktikan oleh tulisan yang ditandatangani oleh Fusing sebagai pemegang hakmilik atau oleh Sia atau EON Bank sebagai penyumbang. Beliau selanjutnya berhujah bahawa 'amanah berbangkit' adalah di luar skop s 9 Ordinan tersebut, dan dengan itu dirangkumi oleh tempoh baki enam tahun yang diperuntukkan oleh perkara 97 dalam jadual.

Diputuskan, menolak rayuan:

(1) Suatu tuntutan untuk mencelah harus dibatalkan *in limine* atas alasan had masa hanya dalam kes-kes di mana adalah jelas bahawa kausa tindakan atas mana tuntutan didasarkan dihalang oleh had masa. Jika, atas anggapan bahawa kesemua fakta yang dihujah adalah benar, ianya amat jelas bahawa tuntutan itu dihalang *dan* had masa dihujah menerusi pembelaan, perkara itu tidak patut dibenarkan diteruskan. Sebaliknya, jika terdapat material yang mana jika dibuktikan akan membawa tuntutan luar daripada rangkuman Ordinan tersebut, perkara itu harus dibicarakan (lihat ms 555I dan 556A–B); *Permalu a/l Vyrapan v G Papathi d/o Govindasamy* [1992] 4 CLJ 2024 diikut.

(2) Adalah undang-undang mantap bahawa tujuan spesifik sesuatu amanah diwujudkan adalah perkara untuk inferens. Dengan itu, dalam kes ini, terdapat kedua-dua persoalan undang-undang dan fakta yang memerlukan pembicaraan penuh (lihat ms 556F–G).

(3) Bagi memakai s 9 Ordinan tersebut, guaman mestilah dibuat oleh atau bagi pihak amanah cestui que trust untuk mendapat kembali harta amanah untuk manfaatnya. Jika guaman pada amnya adalah untuk tujuan ini, ia terselamat daripada halangan had masa oleh s 9. Oleh itu, atas fakta kes ini, Sia dan EON Bank patut dibenarkan mencelah (lihat ms 556G).]

Notes

For cases on limitation period applicable to trusts, see 9 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1944–1949.

Case referred to

Permalu a/l Vyrapan v G Papathi d/o Govindasamy [1992] 4 CLJ 2024 (folld)

Legislation referred to

Sabah Limitation Ordinance (Cap 72)

Appeal from: Originating Summons No T(24)–35 of 1995 (High Court, Tawau)

Cecil Abraham (*Bharti Seth* and *Simon Shim* with him) (*Shim Pang & Co*) for the appellant.

Mekanda Singh Sandhu (*Paul Kan & Co*) for the first and second respondents.

Ian Ghee (*Ting & Co*) for the third respondent.

Mahadev Shankar JCA (delivering the judgment of the court): The facts of this case have been fully set out in the judgment of Ian Chin J.

Suffice to say therefore that the appellant ('Fusing') was registered as the transferee and legal owner of a shophouse ('the shophouse') in Tawau on 27 March 1984. Fusing then leased the shophouse to EON Finance Bhd ('EON Finance'). Differences arose between them and EON Finance discontinued paying rent and refused to vacate. Therefore, Fusing filed the action (which is now the subject matter of this appeal) to have themselves declared owner and for other consequential reliefs. EON Finance asserts that EON Bank Bhd ('EON Bank') is the beneficial owner. After the pleadings were closed and the trial was about to begin, Sia Kie Sung ('Sia') and EON Bank applied to intervene. Each of them claims ownership of the shophouse. Each of them claims to have provided the entire purchase moneys for the shophouse to Fusing so that Fusing would hold the shophouse in trust for Sia and/or for EON Bank as the case may be. This application was made on 27 February 1995.

We need only concern ourselves here with Fusing's submission that Sia and EON Bank should not have been allowed to intervene because their claim is barred by s 9 of the Sabah Limitation Ordinance ('the Ordinance'). It reads in material particular as follows:

> Suits against express trustees and their representatives
>
> 9 Notwithstanding anything hereinbefore contained no suit against a person in whom property has become vested in trust for any specific purpose, ... for the purpose of following in his or their hands such property, shall be barred by any length of time.

There is no specific documentation which spells out the purpose for which EON Bank channelled the purchase moneys through Sia to the vendor of the property. Fusing did not physically pay the vendor. Their reasons why the funds were channelled to the vendor in this way need not detain us here. In the affidavit filed for Sia and EON Bank, it was claimed that because Sia and EON Bank provided the moneys, there was a resulting trust in their favour and their claim cannot be barred by the lapse of any length of time.

Mr Cecil Abraham, counsel for Fusing, referred us to the marginal note of s 9 of the Ordinance and contended that an express trust could not exist in the absence of a declaration of trust manifested and proved by some writing signed by Fusing as title-holder or by Sia or EON Bank as donors. He referred to 48 *Halsbury's Laws of England* (4th Ed, 2nd Reissue) para 543 at p 273. He also referred to para 599 at p 315 and submitted that 'resulting trusts' are out of the purview of s 9 of the Ordinance, and was therefore caught by the residual period of six years provided by art 97 of the schedule thereto.

In our opinion, a claim to intervene, or for that matter an application to amend a pleading, should be struck out *in limine* on the ground of limitation only in those cases where it is manifestly plain that the cause of action upon which the claim is based is barred by limitation. *Permalu a/l Vyrapan v G Papathi d/o Govindasamy* [1992] 4 CLJ 2024 was such a case.

If, on the assumption that all the facts pleaded are true, it is manifestly obvious that the claim is barred *and* limitation is pleaded by way of defence, the matter should not be allowed to go further.

On the other hand, if there is material which if established will take the claim out of bounds of the Ordinance, the matter should go to trial.

This is why it has never been enough for a party who wishes this kind of application to be struck out *in limine* and on affidavit evidence to show merely that he has a 'reasonably arguable case' that limitation has expired.

We are far from convinced that the English authorities cited by Mr Abraham concludes the matter. The Ordinance is based on the Indian Limitation Act. In *Rustomji on Limitation* (7th Ed) at p 183 there appears this passage:

> 17 *Specific purpose, vested in trust* — 'In trust for any specific purpose' refers to trusts created for some definite or particular purpose or object as distinguished from trusts of a general nature, such as the law imposes upon executors and others who hold recognized fiduciary positions. 'Specific purpose' means a purpose which has been specified by the author of the trust. A specific purpose, within the meaning of s 10, must be a purpose that is either actually and specifically defined in the terms of the will or settlement itself, or a purpose which, from the specified terms, can be certainly affirmed. *The specific purpose is a matter of inference ... It is not necessary that an express declaration should be proved.* In England, inferences drawn from the conduct of the parties have been held sufficient to establish an express trust and I think the same principle should apply to trusts of specific purpose within the meaning of s 10. 'Specific purpose' in s 10 is used in contradistinction to trusts arising by implication of law, eg resulting or constructive trusts. (Emphasis added.)

We will leave counsel for the respective parties to delve further into the cases cited therein. If the specific purpose for which a trust is created is a matter for inference, it seems to us that we have a question of mixed law and fact here which merits a full hearing. In the subsequent para 18 in *Rustomji on Limitation*, there appears this passage at p 184:

> To apply s 10, the suit must be by or on behalf of the cestui que trust to recover for his benefit the trust property. If the suit is in substance for this purpose, it will be saved from the bar of limitation by s 10, and will not be allowed to fail upon a mere matter of pleading.

This reflects our sentiments exactly. The facts pleaded in the affidavits go beyond the opinion of the respondents' counsel in the court below that 'a resulting trust' was created, when what is being alleged is that the specific purpose for which the money was provided was that Fusing should hold the shophouse in trust, and not as beneficial owner.

So we dismissed this appeal with costs.

Appeal dismissed.

Reported by Loo Lai Mee